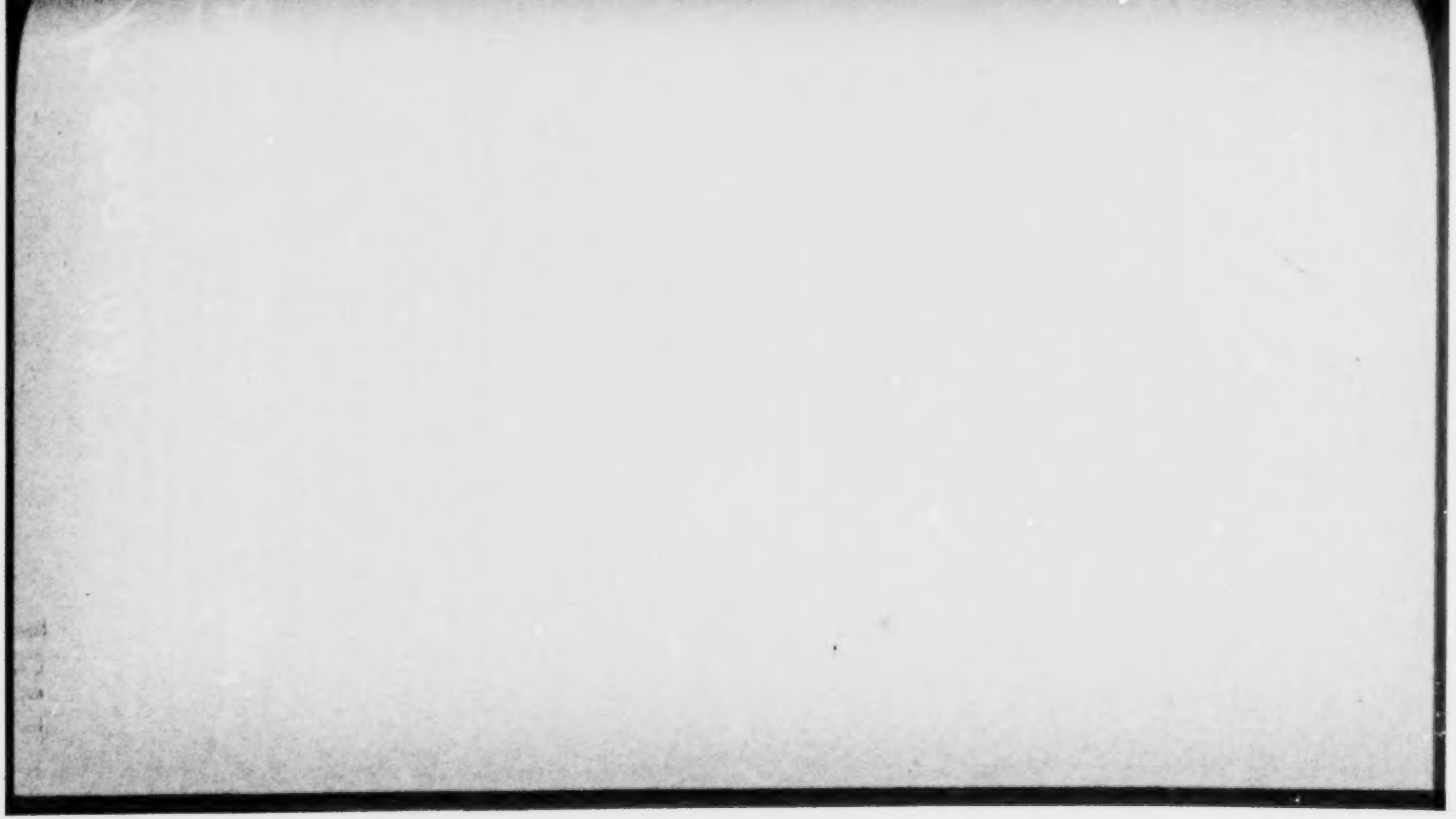

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Supreme Court U.S.
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JAMES H. MCKENNEY,
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Brf. of Marshall & Forbis.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 329.

Filed April 9, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
APPELLANT,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF AND ARGUMENT FOR APPELLANT.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

APPEAL PRINTING CO., 49-55 Vesey Street, N. Y.

Supreme Court of the United States.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant.

vs.

THE MONTANA ORE PURCHASING COMPANY, F. Augustus Heinze, and Arthur P. Heinze,
Appellees.

Oct. Term, 1901.

No. 329.

Appeal from the Circuit Court of the United States for the District of Montana, Southern Division.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement.

This suit was brought for the purpose of preventing trespasses by the appellees on property claimed by the appellant, of avoiding a multiplicity of actions, and of quieting the title to that portion of the Pennsylvania Lode Claim from which ores alleged to belong to the appellants were extracted by the appellees.

This is the same suit which was considered by the United States Circuit Court of Appeals in *85 Federal Reporter, 867*, on an appeal from an order

granting a temporary injunction. The order was reversed because it was held that the bill of complaint did not plead any federal question. In the course of his opinion, Judge Morrow, however, said:

"At the oral argument and in the briefs that have been filed a federal question has been suggested as arising out of the dispute as to the rights of the parties under the Rarus and Johnstown patents; but, as this controversy does not appear in the complaint, it cannot be considered. The jurisdiction of the Circuit Court of the United States is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States. The presumption is that a case is without its jurisdiction, unless the contrary affirmatively appears; and it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. * * * It will be for the Court below to determine whether the complaint can be so amended as to present a cause within its jurisdiction."

Accordingly, on the filing of the mandate a motion was made for leave to amend the bill of complaint, so as to present the federal question which had been discussed, but not pleaded, on that appeal, and leave being granted, an amended bill of complaint was filed by the appellant, which was held by Judge Knowles not to confer jurisdiction upon the United States Circuit Court. To review which ruling this appeal has been taken.

The bill of complaint shows the following facts:

The Pennsylvania Lode Claim in the Summit Valley Mining District at Butte, Montana, now owned by the appellant, was duly located on June 18th, 1877, by William Harris, Sr., and William Harris, Jr., and

a patent therefor was issued on April 9th, 1886 to William Harris, Senior, William Harris, Junior, John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith, and John Dunstan, who had been the owners of all possessory rights under the claim from March 7th, 1883, their interests, however, being unequal (pages 6, 7).

On November 30th, 1888, the appellant became vested with the title to this lode and has ever since been the owner.

Immediately north of the Pennsylvania Claim, locations were made of the Rarus and Johnstown lodes, the latter being known as Lot 173 and the former as Lot 179. The patents issued for these lodes, together with the plats forming a part of such patents, appear at pages 12 and 16 of the record and form a part of the bill of complaint.

The appellee, the Montana Ore Purchasing Company, is the owner of the Rarus and of that portion of the Johnstown lode which is described in the conveyance referred to at page 128 of the record.

It has been the claim of the appellees in the course of the extensive controversies which have arisen between the parties hereto that although the Rarus patent covers but 2.98 acres of surface, in addition thereto it grants 1318 linear feet of lode, and that the ore which has been extracted from beneath the surface of the Pennsylvania lode, which is described in the bill of complaint, constitutes a part of the Rarus lode lying beyond the limits of the surface covered by the Rarus patent.

It has been likewise claimed by the appellees that, although the larger portion of the ground owned by them was originally included within the location of the Rarus claim, it was patented as the Johnstown claim, but that the veins extending un-

der the surface of the Johnstown claim possessed extralateral rights in the Pennsylvania ground, not by virtue of the Johnstown patent, but by virtue of the Rarus patent.

To indicate that we are correctiy stating the appellees' position, we quote from their brief, filed in the United States Circuit Court of Appeals on an appeal from an order granting a temporary injunction against them (*85 Fed. Rep., 867*):

"The appellant, the Montana Ore Purchasing Company, contends that the veins from which it has been extracting ore underneath the surface of the Pennsylvania, have their top or apex within the Rarus lode, as located, surveyed, and patented, and that they depart, on their course or strike, through both end lines thereof, and are continuous on both strike and dip; and that said veins were expressly granted and conveyed to it by the United States patent for said Rarus Lode Claim; that its predecessors in interest were the owners of the Rarus Lode Claim, as located, embracing all the ground within the patent survey lines, at the time they made application for patent, and in possession and entitled to the possession thereof, and of the Rarus lode, and all other lodes, leads, ledges, and deposits having their tops or apexes, therein, which ownership, possession, and right of possession were subject only to the paramount title of the United States, and that they did all and every act and thing necessary to entitle them thereto, as established by the patent itself; that this being true, and the government having the right to grant all or any part thereof to them—there being no prior rights or adverse claims thereto by any third person—and the government having made the grant as recited by the patent, said patent and the rights granted thereunder are valid, and cannot be questioned in this suit or at all, and that therefore said appellant had and has, the absolute right, under the statutes of the United States, to extract the ore from the veins in controversy in this suit."

"Said appellant further contends, as a matter of fact, that the veins in controversy in this suit pass through that portion of the Johnstown owned by appellant and described in the deed above mentioned, and have a portion of their apexes therein, and that they pass on their strike through the end lines of the Johnstown as located and patented."

"While appellant relies primarily upon the Rarus patent and the rights therein granted, it at the same time asserts that the appellee is, by reason of the above-mentioned deed and the acts of appellee's predecessors in interest (the owners of the Pennsylvania and locators of the Johnstown), estopped to dispute this contention."

"Appellee, as we understand, contends that the Rarus Lode Claim has no proper end lines, and therefore is not entitled to any extralateral rights; that the owners of the Rarus are not entitled to any vein or veins beyond the limits of the surface granted by the patent, or beyond the surface lines of that portion conveyed to them by the owners of the Johnstown and described in the deed before mentioned; that is to say, we understand the appellee claims that the grant of the patent for the Rarus lode for the full length thereof between the survey and patented end lines, together with all other veins, lodes, or deposits having their top or apexes therein, gives no rights to such veins, lodes or deposits beyond the said surface limits, and that the veins having their apexes within that portion of the Johnstown owned by appellants depart on their course or strike through the side lines of the Johnstown, and therefore appellants are not entitled to claim extralateral rights thereto under the said deed or the Johnstown patent."

That this presented a federal question is indicated by the elaborate argument of appellees' counsel, based solely upon the United States Revised Statutes, as appears from the following heads of their argument which were carefully elaborated by references to numerous sections of the federal legislation relating to mineral lands:

"I. The statutes of the United States relating to this subject separately provide for the purchase of mineral deposits and for the purchase of lands containing the mineral deposits.

"II. Under the present laws the substance of the grant under the mining statutes is the mineral-bearing veins, to which the surface is a mere adjunct.

"III. The mining statutes in many ways recognize the distinction between surface rights and underground rights.

"IV. The statutes recognize a distinction between locations or claims on the one hand and patented premises or parts of claims on the other."

The appellant took issue on these various propositions, insisting that under the mining statutes no valid patent could be issued conveying a lode independently of the surface in or under which it had its apex.

This Court having never passed on the controversy thus presented, a subject of cognizance by the Federal Courts was clearly involved.

It is this contention which was referred to by the United States Circuit Court of Appeals as presenting a federal question which did not appear in the complaint. It was evidently considered as being of sufficient importance to present a cause for federal jurisdiction and to merit presentation in the form of an amended bill of complaint. Accordingly, the amended bill of complaint added to the jurisdictional allegations which the Court declared to be insufficient, the allegations appearing at pages 13 to 17 of the record.

The appellant was justified in so pleading, not only by the argument of the appellees in the United States Circuit Court of Appeals, but also by their insistence in an action between the same parties, which is reported in *20 Montana, 336*, and in an action which

they have brought in the United States Circuit Court, Division of Montana, against the appellant.

Defendants answered the amended bill, admitting their ownership of the Rarus claim and of the portion of the Johnstown claim referred to in the complaint (page 21). They alleged that the vein upon which they mined within the lines of Pennsylvania claim had its apex within that portion of the Johnstown Lode Claim owned by them, and that such vein passed on its strike through the end lines of the Johnstown claim as located and patented, and that such end lines were parallel.

For the purpose of ousting the Federal Courts of jurisdiction, the appellees thereupon made the following extraordinary allegations (pages 24 to 27):

"And the defendant, as showing to your Honors that the questions involved in this case are not questions arising under the statutes of the United States, or involving the construction thereof, alleges that it does not claim to own a portion of the ground patented under both the Rarus and Johnstown patents, or that it claims *in this action* that by virtue of said Rarus patent it has acquired 1,318 linear feet of what is designated or called the Rarus lode; and denies that it is contended *in this action*, by the defendant, that under and by virtue of said Rarus patent it or its predecessors in interest were granted 1,318 linear feet to the Rarus lode, extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location."

"Defendant alleges that it claims to own, and does own, whatever rights were granted under the patent for the Rarus Lode Claim issued by the United States, but that it does not assert any title *in this action* under said patent as against the complainant, but relies upon its ownership of that portion of the Johnstown and Pennsylvania Lode Claims hereinafter described."

"Defendant admits that the surface ground granted to the predecessors in interest of the de-

fendant in the Rarus Lode Claim is as shown by the yellow shading on the map attached to the Rarus patent, but defendant denies that it contends *in this action* or claims that the patent for the Rarus Lode Claim granted to it or its predecessors in interest to the Rarus lode beyond the surface ground granted by the Rarus patent, or to the full extent thereof of 1,318 linear feet; and denies that it contends or claims *in this action* that by reason of the ownership of said lode for the length aforesaid, or by reason of the fact that the same passes through the east end line of the Rarus Lode Claim as patented and the west end line of the original location of said claim, that it is entitled to follow said veins on their course or dip into the earth without the lines of the Rarus Lode Claim, either as originally located or as patented."

"And defendant alleges that *in this action* that it makes no claim of any right under the Rarus patent to enter upon the vein within the grounds claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown Lode Claim, and the fact that the top or apices of the veins or load in question are within said portion of the Johnstown Lode Claim. Defendant admits that a large portion of the ground which was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, and defendant denies *that in this action* it contends or claims that only the surface ground of the Johnstown Claim was patented to the patentees named herein, or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; and denies that it claims or contends that it is entitled to claim the veins extending through the Johnstown patent under or by virtue of the Rarus patent, or that its extralateral rights should be determined by the Rarus patent, and not by the Johnstown patent; but defendant alleges that it contends and claims *in this action, and in so far as this controversy between complainant and defendant is concerned,*

that its extralateral rights to the veins in question should be determined by its ownership in that parcel of ground now included within the Johnstown claim and not by the Rarus, for the reason that the said vein or lode have their top or apex within the said parcel of ground owned by the defendant."

"Defendant denies that it makes any claim in *this action* that if it has no right to follow the veins within the lines of the original Rarus location by virtue of said Rarus patent, that it has a right to follow the same under and by virtue of the Johnstown patent, or of the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode Claim belonging to the complainant; and defendant asserts that it does not rely upon any combination of the Johnstown and Rarus patents *in this action*, but relies upon its ownership of this parcel of ground conveyed to its predecessors by the owners of the Johnstown claim and the Johnstown patent."

* * * * * *

"As there is no controversy between the complainant and defendant *in this action* upon any of the matters or things suggested or stated by the complainant in its amended bill of complaint for the purpose of showing that this Court has jurisdiction, defendant therefore asserts that this Court has no jurisdiction of the subject matter of this action or the controversies between the complainant and defendant herein."

An application was made by the appellees on this state of the pleadings to the Circuit Court for a dismissal of the bill of complaint on the ground of a want of jurisdiction which application was sustained, and thereupon the Court certified "that upon the said amended bill of complaint, and the said answer thereto, this Court sustained said application to dismiss, and entered a decree of dismissal in accordance therewith, holding that a

federal question was not presented by said allegation and that in consequence thereof there was no jurisdiction in this Court in said action" (pages 35 to 51).

Error is assigned upon the ruling so certified (page 52).

APPELLANT'S ARGUMENT.

I.

The amended bill of complaint conferred jurisdiction upon the Circuit Court of the subject matter in controversy, although divers citizenship of the parties does not exist.

While it is undoubtedly true that the presumption obtains that a case is without the jurisdiction of the Circuit Court, and that it is necessary by positive averment in the pleadings to show the existence of jurisdiction, it is, nevertheless, true that the Federal Courts will not strain to decline the exercise of jurisdiction where a reasonable showing for assuming it has been made.

Nashville Ry. v. Taylor, 86 Fed. Rep., 168.

It has been held that a suit cannot properly be dismissed by a Circuit Court of the United States as not involving a controversy within the jurisdiction of the Court, unless the facts as made to appear on the record create a legal certainty of that conclusion.

Barry v. Edmunds, 116 U. S., 550.
DePutron v. Young, 134 U. S., 241.

In *Starin vs. New York*, *115 U. S.*, *248*, Chief Justice Waite said:

"If from the question it appears that such *title*, right, privilege or immunity on which a recovery depends will be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution and the laws of the United States within the meaning of that term as used in the Act of 1875."

The facts here presented indicate Federal jurisdiction.

(*A*) The bill of complaint clearly presents a federal question arising under the mining laws of the United States, involving a substantial controversy existing between the parties, based upon these statutes, which must be finally passed upon, in order to determine their respective rights in the property which is the subject matter of this litigation.

(*a*) The allegations added by the amended complaint present a most important question under the mining laws, which has never received adjudication at the hands of the Supreme Court, and one which has been much mooted by text writers, as well as by the parties to this litigation. The question relates to the right of the land department to segregate the surface of mineral lands from the mineral in the ground, granting the former to one person and the latter to another. The solution of this question necessarily involves the consideration of the entire body of Federal statutes relative to locating, purchasing and patenting mineral lands, and the rights of patentees, under governmental grants, where the land department has assumed to patent a lode as distinguished from the surface overlying it.

U. S. R. S. §§ 2320, 2322. In *Montana Ore Purchasing Co.* vs. *Boston & Montana Consolidated Copper Co., 20 Mont., 336 S. C., 51 Pacific Rep., 158*, the nature of this question is thus stated by Mr. Justice Buck:

"Appellant calls to our attention various expressions, occurring in different sections of the United States mineral land statutes, for the purpose of showing that the surface is not regarded as an essential incident of the lode or vein in or below. It is no doubt true that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith. In support of this ruling, we deem it necessary to cite only from a most valuable treatise on mines which has just been published. In Section 780, Vol. 2, Lindl. Mines, and Sections 58–60, Vol. 1, *id.*, the author most ably discusses the subject of the relationship of the surface to the lode, and collates the federal and State decisions directly pertaining thereto."

(*b*) The fact that in this very case the appellees deliberately argued that question before the Circuit Court, with consummate ability and thorough elaboration, is in itself a demonstration that such a Federal question exists.

(*c*) The seriousness with which the matter has been discussed by the Supreme Court of Montana in an action between these parties, relating to the very property now in controversy (*20 Mont., 337*), likewise indicates that the claim set forth in the bill of complaint as a ground for asserting jurisdiction, relates to a real and substantial controversy.

(*d*) This is accentuated by the fact that there is now pending in the Circuit Court still another action between these parties, in which the appellees assert their rights under the Rarus claim with respect to ore bodies adjoining those which are under consideration here on the sole ground now suggested.

(*e*) The action of the Circuit Court of Appeals on the former appeal of intimating to the Court below the propriety of an amendment of the bill of complaint so as to present a cause within its jurisdiction, indicates that that Court must have considered the questions argued before it on that appeal, but which were not pleaded in the bill of complaint, to sufficiently present a jurisdictional question.

(*f*) But it is now claimed that the question of what was granted by the Rarus patent merely involves the interpretation of a written instrument, and not the consideration of any Federal Statute.

It is a sufficient answer to this claim that the controversy is not as to the language employed in the patent, but as to whether or not, under the statutes of the United States, such patent had validity in so far as it assumed to segregate the surface from the mineral lying therein. That is not and was not treated by the appellees counsel on the former appeal as a question involving the interpretation of the patent, but one which clearly involved the construction of the statutes under which the patent purported to have been issued Appellees counsel, in their former brief, frankly state the controversy involved between the parties as follows:

"We are therefore brought directly to the question as to whether, under the statutes, the patent-

ed surface of a mining claim and the underground rights to the veins are necessarily coterminous. The contention that they are, entirely ignores various statutory provisions, and is contrary to the whole tenor of the mining statutes."

(*g*) The claim that if the Rarus patent is out of the way the case turns entirely upon the Johnstown patent, and that the latter presents no Federal question, is scarcely ingenuous.

The position which the appellees have taken is that they are entitled to the ore bodies in controversy, under the Rarus patent, even though their claim under the Johnstown patent is of no avail, because the apex of the vein passing through the Johnstown on its strike crosses its side lines, instead of its end lines. Hence, it will become necessary, in order to obtain a final adjudication upon the rights of the respective parties as to the property rights involved, to pass upon the validity of the appellees' claim, which is based on the Rarus patent. Until that is done, there will be a continuance of the controversy between the parties.

(*h*) A further Federal question is presented by the claim that the complainant cannot obtain relief for ores taken without showing that the apices of the veins from which the ore was so extracted were within its own premises (page 8).

Assuming that the appellees have no extralateral rights, based either upon the Johnstown or Rarus patents, it will become necessary to determine whether, on the assumption that the apices of the veins in which the ore in controversy is found are beyond the Pennsylvania boundaries, the appellant would be entitled to such ore.

This is a much mooted question, as to which there is a division of judicial opinion, and which,

so far as known, has not received direct adjudication from this Court. Judge Knowles, in *Montana Co., Limited, v. Clark, 42 Fed. Rep., 626,* has decided the question one way, and adheres to his opinion, notwithstanding the contrary views expressed in

Leadville Mining Co. v. Fitzgerald, 4 Morrison's Mining Reports, 380.
Duggan v. Davey, 4 Dak., 110.
Doe v. Waterloo, 54 Fed. Rep., 935.
Consol. Wyom. Co. v. Champion Mining Co., 63 Fed., 540.

(*i*) At the time when this suit was commenced and the amended bill of complaint was filed this Court had not decided *Del Monte Mining and Milling Co. vs. Last Chance Mining and Milling Co., 171 U. S., 55,* which involved the question of the right to locate claims so as to project an end line on lands patented to another locator, for the purpose of and to create such parallelism of end lines, as is essential to the presence of extralateral rights.

That important federal question was in all seriousness presented in the present suit, by the allegations at page 7 of the record.

As is shown by the authorities herein cited, the question of jurisdiction is to be determined by the case made in the bill of complaint, and a question arising under the Act of Congress then mooted and undetermined necessarily was a federal question, even if in consequence of a subsequent decision by the ultimate tribunal it thereafter ceased to be one.

(*j*) The question is also presented as to the rights of the complainant to the property and property rights in controversy based on the alle-

gation "that the apex of the veins from which the ores in question were extracted is divided in that a portion thereof is claimed by the defendants as upon the Rarus Lode Claim and a portion thereof upon fhe Johnstown Lode Claim, and a portion thereof upon the Pennsylvania Lode claim, and defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims at their election" (pages 8 and 9).

The ascertainment of the rights of adjoining locators resulting from the existence of a divided apex involves the determination of an important questison of the interpretation of U. S. R. S., § 2322, as to which the Courts are in conflict.

Hall vs. Equator Mining Co., 11 Federal Cases, 225.

Bullion Beck & Champion M. Co. vs. Eureka Hall M. Co., 5 Utah, 3.

2 Lindley on Mines, § 583.

(*B*) This brings us to the discussion of a number of well-settled principles governing the determination of what constitutes a federal question.

(1) The federal questions stated in outline, existing, it by no means follows that to confer jurisdiction it will be actually necessary for the Court, when it comes to pass upon the case, to base its decision on those questions, or even to conclude that the appellant's position on the merits of those questions is sound.

As has been recently said by Judge Clark, in *Nashville C. & St. L. Ry. v. Taylor, 86 Fed. Rep., 168:*

"It will be well before dealing more closely with the question of jurisdiction here raised to note the clear distinction between the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether there is a claim which presents the federal question, and whether that claim is well founded, when considered on its merits, are different and distinct questions. The one goes to jurisdiction and the other to the merits of the case. It is true the question must be raised, and it is true that the Court must take the jurisdiction before it can determine whether the right is valid or well founded. This distinction must be attentively observed to avoid confusion. The distinction was referred to in the case of *Mayor v. Cooper*, *6 Wall.*, *247*, the Court saying: 'We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen. The validity of the defense authorized to be made is a distinct subject. It involves wholly different inquiries. We have not had occassion to consider it. It has no connection whatever with the question of jurisdiction.' "

Again, in *Insurance Co. v. Needles*, *113 U. S.*, *574*, Mr. Justice Harlan said:

"And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

So in *Southern Pac. R. Co. v. California*, *118 U. S.*, *112*, Chief Justice Waite, delivering the judgment of the Court, said:

"Applying these rules, which must now be considered as settled, to the present case, it is ap-

parent that the Court below erred in deciding that the suit was not removable, for it distinctly appears that the right of the State to recover was made by the pleadings to depend (1) on the power of the State to tax the franchises of the corporation derived from the acts of congress, which were specially referred to, as well as the property used in connection therewith; and (2) on the effect of Article 14 of the amendment of the constitution on the validity of the construction of statutes under which the taxes sued for were levied. The first depended on the construction of the acts of congress, and the second on the construction of the constitutional amendment. If decided in one way, the State might recover; if in another it would be defeated at least in part. The right of removal does not depend upon the validity of the claim set up under the constitution or laws. It is enough if the claim involves any substantial dispute of controversy in the suit. In this case there can be no doubt about that."

The distinction was brought out clearly again in the recent case of *Insurance Co. v. Austin*, *168 U. S.*, *695*, in which Mr. Justice White, speaking for the Court, said:

"Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the State law and the city ordinances violate the constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this Court does not exist where it is claimed that a State law violates the constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious, and should be maintained, without taking jurisdiction of the case."

(2) In like manner, the fact that the case involves questions depending on general principles

of law, in addition to the federal questions, and may be eventually decided on the former, does not prevent the jurisdiction from attaching.

As was said by Chief Justice Marshall, in *Osborne v. Bank of the United States, 9 Wheaton, 738-822:*

"We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the Circuit Court's original jurisdiction, in any case to which the appellate jurisdiction extends.

"We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on a construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and

thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the Federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

"We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

The same idea was expressed in *R. R. Co. v. Mississippi*, *102 U. S., 140*, where the Court said:

"It is not sufficient to exclude the jurisdiction of the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States, but when a question to which the judicial power is extended by the constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Court jurisdiction, although other questions of fact may be involved in it."

In *Mayor v. Cooper*, *6 Wallace, 253*, the Court, discussing the same question, said:

"Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exists—if there be a single such ingredient in the mass—it is sufficient. That element is decisive upon the subject of jurisdiction."

In *Gold Washing and Wateriag Co. v. Keyes*, *96 U. S., 203*, Chief Justice WAITE said:

"The suit must at least in part arise out of a

controversy between the parties, in regard to the operation and effect of the constitution or laws upon the facts involved."

That such a controversy exists between the parties to this litigation is absolutely demonstrated by the history of this litigation, and is affirmatively and positively averred in the bill of complaint.

(3) This case does not come within the principle of the authorities which deny jurisdiction where it does not appear from the statement of the complainant's cause of action that a federal question exists.

Reading the bill of complaint according to its clear scope and in its true spirit, it discloses the appellant's *grievance* to be, that while it asserts ownership under government patents to the Pennsylvania claim, and to all ore contained within its boundaries, the appellees are questioning its title, and interfering with its enjoyment of its property right, by asserting the ownership of a portion of such claim, based upon two government patents, issued for the Rarus and Johnstown claims respectively; that such asserted ownership of the appellees is without legal foundation, for the reasons stated in the bill, the consideration of which necessitates its examination of federal questions. Hence, the case is in effect one to quiet the appellant's title; or to prevent an interference with its rights of property, the nature and extent of which depends upon a determination of federal questions. That is its subject matter, and in referring to the appellees' claim, and assuming that under the mining laws it is a wrongful interference with the appellants' property rights it has stated its own claim, its own cause of complaint and not the appellants' defenses.

Or to still more simplify the case, the questions presented by the complaint are these: The complainant asserted ownership of a quantity of ore in place, and to ore which had been taken from within the boundaries of the Pennsylvania claim the surface rights to it. A controversy existed between the complainant and the defendants as to the ownership of this ore. This controversy involved a number of propositions, the determination of which were essential to the complainant's right of recovery. It was not sufficient for the complainant to show that the ore was taken from within its boundaries in view of the doctrine of extra-lateral rights appertaining to mining claims. If the apex of the vein from which the ore was taken was in ground belonging to the defendants, the complainant would have no right to the ore; hence the solution of the propositions which are stated in the bill of complaint became essential for the purpose of determining whether or not the complainant had a cause of action against the defendant.

If the vein did not apex in either the complainant's or in the defendants' property, then a Federal question was presented under the authorities already considered. If the vein did not apex in the ground patented to the locators of the Rarus claim, although it did apex within the ground of the original location of that claim but which was not patented to the locators, then a federal question was presented. If the vein apexed on the boundary line between the Johnstown and the Pennsylvania claims, and the vein had a divided apex, a federal question was presented.

Hence the controversy between the complainant and the defendants was one which necessarily involved the ascertainment not only of the boundaries of the complainant's patent, but likewise

the strike, dip and apex of the vein in which the ore in controversy was found, and the complainant's cause of action as to such ore and a proper statement thereof properly involved the allegations are contained in the bill of complaint herein and which as has been shown present a number of very important federal questions.

In this regard the case differs materially from the authorities in which the complainant's cause of action and the complainant's right does not involve the statement of a federal question, but where the complaint, by way of anticipation of a defence which may or may not be interposed, or which may or may not exist, referred to such pretended defence and sought to show that it would involve a federal question.

In *Tennessee v. Union and Planters' Bank*, *152 U. S., 454*, the State brought an action to recover taxes alleged to be owing. The complaint then asserted that the defendant claimed exemption under its charter, and that the revenue law imposing the taxes impaired the obligation of a contract, and further alleged: "It may be, however, that complainants are mistaken in the foregoing construction of the Charter, and that the shares of stock are taxable, and the capital stock of said institution exempt. The question is one of law, and is submitted to the Court for determination."

On this showing it is apparent that the plaintiff was merely attempting to anticipate the defenses which the bank might interpose, and was not alleging matters which were involved in its cause of action.

Chappell v. Waterworth, *155 U. S., 102*, and *Walker v. Collins*, *167 U. S., 57*, were removal cases, in neither of which did the complaint indicate the existence of a federal question. In the first the action was in ejectment simply, and the

answer claimed occupation under the United States for light-house purposes. In the second, the action was in trover, and the answer justified under an attachment issued out of the United States Circuit Court. Mr. Justice WHITE said:

"As in the complaint in the case at bar, there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred; the case comes directly within the operation of the ruling cited."

In *City of Fergus Falls v. Fergus Falls Water Co.*, *72 Fed. Rep.*, 873, the same point of differentiation exists.

Judge Caldwell says:

"The plaintiff seeks, in its complaint, to inject a federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of its council, which impaired the obligation of the contract, in contravention of the constitution. It is apparent that the only use the plaintiff proposes to make of the constitution is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense."

Here the allegations relate to the appellants cause of action; they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defense, but as establishing the appellant's right to have its title quieted.

It is important to note that in the case cited, there was a vigorous and well-reasoned dissenting opinion by Judge Sanborn, strongly supported by authority, and that the decision actually proceeded on the theory that the trial disclosed that no

federal question was involved, but simply one of power under the laws of Minnesota.

In *Walla Walla v. Walla Walla Water Company* (*172 U. S., 1*), which was subsequently decided, a bill was filed in the United States Circuit Court by the Water Company to enjoin the city from creating proposed water works, or from expending city moneys for that purpose, or from issuing city securities therefor, it being alleged that by an act of the legislature of Washington Territory the city was empowered to provide itself with a sufficient supply of water and to permit the use of its streets for the purpose of laying pipes for furnishing such supply for a term not exceeding twenty-five years. Under this authority the City, by contract, granted to the Water company the right to lay and maintain water mains for twenty-five years under certain conditions, among others that the contract was voidable by the city so far as it required the payment of money upon a judgment of a Court of competent jurisdiction, whenever there should be a substantial failure of the water supply, or a like failure on the part of the Water Company to perform its agreements, and that until the contract should have been so avoided, the city should not erect or maintain, or become interested in other water works. These provisions were accepted by the Water Company and were complied with by it. Before the expiration of the contract period the city authorities passed an ordinance to provide for the construction of a system of water works to supply the city with water and to issue bonds for that purpose, which ordinance was accepted by the necessary majority of legal voters.

The bill of complaint alleged that the ordinance under which the city was seeking to justify its

action constituted an impairment of the obligation of the contract between the city and the Water Company, and jurisdiction was asserted on that ground only, there being no diversity of citizenship. A demurrer was interposed to the bill on the ground of want of jurisdiction and in considering that subject Mr. Justice Brown said:

"The jurisdiction depends specifically upon the allegation in the bill that *defendants insist that the contract of the city with the plaintiff was not a valid and binding contract*, either with respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water; * * * and in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States" (p. 7).

The opinion proceeds (p. 11):

"The argument which attacks the jurisdiction of the Court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction, goes rather to the sufficiency of the pleading than to the jurisdiction of the Court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired, if not practically destroyed."

In *Cox v. Gilmer* (*88 Fed. Rep., 343*), an action for false imprisonment, averments were made in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a State law which is repugnant to the Constitution of the United States. It was held that these allegations were not open to the objection of anticipating the defense for the purpose of showing that a federal question was involved, and that jurisdiction was conferred on the United States Circuit Court thereby.

After citing *White v. Greenhow* (*114 U. S., 307*), the Court said:

"The Court is unable to draw any distinction between the averments in the declaration in White v. Greenhow, *supra*, and the averments in the declaration in the case we are now considering. In each case the injuries complained of are alleged the direct result of the operation of a legislative act that is repugnant to the Constitution of the United States. The plaintiff in this case does not, as contended by counsel for the defendants, allege or suggest that the defendants will set up by way of defense a claim that they acted under the constitution or laws of the United States, in order to raise a federal question, of which this Court was to have jurisdiction. The doctrine established by the decisions in Tennessee v. Union & Planters' Bank, and in the other cases cited, is not applicable here."

The cases of *Blackburn v. Portland Gold Mining Company* (*175 U. S., 571*) *and Shoshone Mining Company v. Rutter* (*177 U. S., 505*), which will probably be cited by the appellees, are not parallel cases. Both of them involve a controversy between two claimants to a mining patent, jurisdiction over which was conferred by express legislation upon "a Court of competent jurisdiction" to determine the question of the right of possession.

The controversy did not involve the interpretation of any federal legislation or constitutional provision, but solely questions of fact.

The view of this Court is summarized in the concluding sentence of the opinion of Mr. Justice Shiras in the first of these cases, in which he says:

"Without undertaking to say that no cases can arise under this legislation which then upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining district in which the lands are situated. In a case, therefore, like the present, where federal jurisdiction does not arise because the parties are citizens of different States, and where no question is made as to the meaning and construction of the Statutes of the United States, the State Courts are to be regarded, with the letter and meaning of Section 2326 (U. S. R. S.) as Courts of 'competent jurisdiction to determine the right of possession.'"

In the second of these cases Mr. Justice BREWER, after a reconsideration of the doctrine laid down in the *Blackburn case*, says:

"So we conclude, as we did in the prior case, that although these suits may sometimes so present questions arising under the constitution or laws of the United States that the federal Courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the Statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal Courts."

II.

A federal question having been presented by the bill of complaint, it cannot be and has not been eliminated by the appellees' answer.

It was the purpose of the appellant to procure an adjudication upon the claim of title asserted by the appellant to the ore which they were engaged in extracting from the Pennsylvania ground. The appellees contested and disputed the appellant's ownership to the ore bodies in controversy. They asserted a right, based both upon the Johnstown and the Rarus patents. By so doing, they threw a doubt upon the appellant's title, which justified it in instituting a proper action to quiet its title and to procure an adjudication to the effect that the appellees had no right whatever, under any claim of title, to the appellee's property.

Such is the essential nature of the appellant's cause of action.

Gillis v. Downey, 85 Fed. Rep., 483.

The appellants therefore, had the absolute right to obtain an adjudication in this action as to the entire controversy existing between it and the appellees. It had the right to choose its own method for presenting that question. It was not bound to split up its cause of action into two parts, and to first litigate the validity of the appellee's claims based upon the Johnstown patent and then, in another suit, to procure an adjudication as to the validity of the appellees' claim based upon the Rarus patent.

If the appellees could force the appellant to try the question piecemeal, it would result in unnecessary litigation, which is contrary to public policy,

and a determination that they had no rights under the Johnstown patent would still render it necessary to ascertain whether they had any rights under the Rarus patent.

If the appellees should succeed in their novel practice, the appellant could be made the plaything of the Courts. Asserting the right to have a concrete proposition determined by the Federal Court, they would be told that the Court had been deprived of jurisdiction because the defendants had elected not to make any claim in *this* action founded upon any federal statute. Then upon their resorting to the State Court for redress, the appellees would at once defend both upon the Johnstown and Rarus patents, and require the appellant to litigate with respect to both in the tribunal of the defendant's choice.

Such a result is not to be tolerated. It savors too much of bad faith and jugglery.

We will now examine the appellees' arguments based on their answer more closely:

(*a*) The attempted disclaimer by the appellees that they make no claim of any rights under the Rarus patent in *this* action is a sham, and in no view of the case can it operate as an ouster of jurisdiction.

The so-called disclaimer, from beginning to end, is a series of evasions, of negatives pregnant, and of transparent attempts to deceive the Court into the belief that the appellants have abandoned all claim under the Rarus patent, while, in fact, they repeat with tiresome iteration that it is only in *this* action that they make no claim, unmistakably declaring it to be their purpose *that in some other action, in some other tribunal, of their own selection, it is their purpose to make the very claims which they wish this Court to ignore.*

To term the appellees' pleading a "disclaimer," is a misnomer.

In *1 Daniell's Chancery Pleading and Practice 6th Am. ed., 706*, the author says:

"A disclaimer is where a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims—that is, renounces—all claim thereto. Though a disclaimer is in substance distinct from an answer, yet it is in point of form an answer, containing simply an assertion that the defendant disclaims all right and title to the matter in demand. In order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant does not and never did claim, and that he disclaims all right and title in the subject matter of the suit."

In *1 Beach, Modern Equity Practice, Sec. 282*, the author says:

"Pleadings in equity are founded on the purest principles of ethics, and especially in a disclaimer evasion and negatives pregnant will not be tolerated. Thus, where creditors sought to reach and subject the real estate of a deceased debtor, alleging that the defendants were heirs, a disclaimer denying to themselves all claim as 'the heirs' was deemed open to objection, for it not only left the defendants at liberty to claim as devisees, but if it were literally construed, it would be only an averment that they were not all the heirs."

Bentley v. Cowman, 6 Gill & Johnson, 152–154.

In *Story's Equity Pleading, 10th ed., Sec. 884 n.*, a form of a disclaimer is given as follows:

"This defendant saith that he doth not know that he, this defendant, to his knowledge or belief, ever had or did he claim or pretend to have, nor doth he now claim any right, title or interest

of, in, or to the estates and premises situate, etc., in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, or interest in and to the said estate or premises in, etc., in the said complainant's bill mentioned, and every part thereof."

Being designed to operate as a release, the disclaimer must be signed by the defendant himself and his signature attested by some person competent to be a witness.

In *Dickerson v. Hodges, 43 N. J. Equity, 45*, Vice-Chancellor Van Fleet said:

"Such requirement is necessary for the protection of both parties, and simply puts such transactions occurring in the course of a suit on the same footing as like transactions occurring outside of a judicial proceeding."

In *6 Encyclopedia of Pleading and Practice, p. 738*, Title "*Disclaimer*," it is said:

"A disclaimer operates as an estoppel, and as between the parties and privies is an absolute bar to the further assertion of the right renounced, but it does not extend any farther than to the matter actually embraced in the disclaimer."

See *Mardes v. Meyers, 28 Southwestern Rep., 693.*

In *De Uprey v. De Uprey, 27 Cal., 329; s. c., 87 Am. Dec., 81*, it was held that a disclaimer contained in an answer, to be effective, must be absolute and unqualified. Less than this plaintiff is not bound to accept.

Chief Justice SANDERSON said:

"But it is argued, in support of the motion, that the pleadings show no cause of action as against Samuel De Uprey, because he disclaimed any interest in the land. Such, however, does not ap-

pear to be the fact. His answer does not contain an absolute unqualified disclaimer. Less than that the plaintiff was not bound to accept. He only disclaims all interest, except such as he may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife. It may be that such interest did not amount to anything in law, but that was one of the questions which he had helped to make and which the plaintiff had a right to have determined and put to rest by the judgment of the Court. But be that as it may, he could not have claimed a dismissal of the action upon the ground of a disclaimer, unless he made that disclaimer in absolute and unconditional terms. Instead of doing that, he denied all the allegations of the complaint as to the plaintiff's title, pleaded two statutes of limitations, and averred title in his wife and claimed for himself a right of homestead in the premises, but disclaimed any further interest. It is a misnomer to call such an answer a disclaimer."

In *Prescott v. Hutchinson*, *13 Mass.*, *441*, the purpose and function of a disclaimer are clearly pointed out. It is treated as a bar to an action, "as it shows that he (the party disclaiming) had no right of action against the adverse party, either in this or any other form."

In *Oakham v. Hall*, *112 Mass.*, *534–539*, Mr. Justice WELLS says:

"A disclaimer is a renunciation of title and right of possession. If not falsified, it defeats the action, but the demandant is thereupon entitled to the possession of the land, and the party pleading the disclaimer is forever estopped by the judgment from denying his right of possession. If, however, the plea is falsified, the tenant is nevertheless bound by his disclaimer, and the demandant may have judgment against him. The judgment upon a disclaimer, whether for or against the demandant, is conclusive in his favor, upon title, as between the parties. It is sometimes said

to inure as a conveyance to the demandant of whatever title or right the party disclaiming had in the land."

Of course, where a disclaimer relates to one of several titles asserted by the party disclaiming, it merely operates as an estoppel against the assertion of the particular title thus disclaimed.

In *Tappan v. Boston Water Power Co., 157 Mass., 34–42*, it appeared that in a writ of entry the tenant filed a disclaimer as to a part of the demanded premises, and pleaded *nul disseisin* as to the other. The demandants did not discontinue the action as to the part disclaimed, but the trial proceeded upon the pleadings as they stood, and the Court found generally in favor of the tenant. The finding was reversed by the Appellate Court as to the part not included in the disclaimer. It was held that while the tenant was entitled to judgment upon the disclaimer, that did not give him title to the part disclaimed, Mr. Justice Morton saying:

"This decision gives it (the defendant) title to the parts disclaimed. The disclaimers are conclusive as between it and the demandants and their privies, as to the right and title of the demandants and the lands included in the disclaimers. If, therefore, the demandants eventually should succeed in also establishing the title to so much of the demanded premises as lies between the easterly channel and the thread of the stream, they will have established their title as between themselves and the tenant and its privies to all of the demanded premises that fall within the lines previously described."

The appellees will probably cite *Crystal Springs L. & W. Co. v. City of Los Angeles, 82 Fed. Rep., 114*, but that case is in no respect an authority for their contention. There was in that case an absolute disclaimer. Both parties claimed

under Mexican grants, confirmed and patented by the United States under the Treaty of Guadaloupe Hidalgo. The bill alleged, as the only ground of federal jurisdiction, that the defendant's claim of title was based in part on certain acts of the Legislature of California, which attempted to transfer to him the title held by the complainant's grantors at the time of the passage of these acts. The defendants in their answer not only denied this allegation, but also disclaimed in the following language:

"But, on the contrary, this defendant disclaims having acquired under any of said acts of the Legislature any right, if any, to the water flowing upon the surface or beneath it in the bed of said river, or any other water or right whatsoever, if any, which was at the time of the passage of said acts vested in the said Los Angeles City Water Company or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company, or in any private individual or corporation, and this defendant denies that it claims or ever claimed under or by virtue of said acts of the Legislature, or any of them, the right to develop waters percolating in the bed of said river, etc."

In similar language, the defendant, in the most comprehensive and unambiguous form, disclaimed any rights based upon such acts of the legislature. The contrast of the language considered in the case cited with that contained in the defendant's answer sufficiently distinguishes the cases. Judge Wellborn said:

"While the disclaimer embraces what is thus suggested by defendants, it goes further and precludes the defendants, if there were rights vested in private persons at the passage of said acts of the legislature, from asserting title through said acts as against said vested right. Furthermore,

this suit is one to quiet title, and complains, for cause of action, alleged ownership of the property, defendant's claim thereto, and that said claim is unfounded. According to my previous rulings herein, the only ground of federal jurisdiction grows out of the altegations of the bill, that one of the claims of the defendant is that certain acts of the legislature of California attempted to transfer to it the title held by the complainants at the time of their passage, and that said acts, if construed as supporting such claim, are repugnant to the Constitution of the United States. Now, if the defendant claims for said acts no other effect that that they transferred to or continued in the city of Los Angeles as successor in law of the Mexican Pueblo of Los Angeles, only those rights which belonged to the latter, then those acts, if construed as supporting said claim, do not impair or effect any vested rights of complainants, and therefore, are not repugnant to the Constitution of the United States."

(*b*) The claim that, irrespective of the disclaimer, the denials of the answer, and the issues sought to be tendered by it, control the question of jurisdiction is likewise unsound.

It is elementary that jurisdiction depends upon the state of things existing when an action is brought. The right to sue and to invoke jurisdiction is anterior to the defense.

This was expressly decided in *Osborne v. Bank*, 9 *Wheaton*, 824, where Chief Justice Marshall said:

"The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to ac-

quire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not."

In *Sawyer v. Parish of Concordia*, 12 *Fed. Rep.*, 757-758, it was held that the jurisdiction of the Federal Courts cannot be vested or divested by the character of the defense made, but depends upon the issues raised by the plaintiff's petition and necessary to be determined to afford him adequate remedy. After citing the language just quoted, the Court said:

"Can his right to sue depend on anything else? If the jurisdiction depends on or could be ousted by the character of the defense, or was limited by the denials in defendant's answer—should he file one—or by the matters or facts he should choose to put at issue, then it is apparent that the ingenuity of counsel would have much to do with confirming or denying jurisdiction. If it depended on the jurisprudence of the said Courts on similar issues to those involved in the case at bar, the power of this Court to try such cases as this one would often rest on the opinions of the State Judges."

Numerous illustrations of the principle that jurisdiction depends upon the facts existing at the time of the commencement of the suit, and which are set forth in the bill of complaint or declaration, may be cited.

Thus, where jurisdiction is given by the amount of plaintiff's demand, it is not ousted because there is a verdict or judgment for less, or because the demand is reduced below the limit by offsets.

McKnight v. Ramsey, 1 Cranch C. C., 40.
Hulsecamp v. Teall, 2 Dallas, 358.
West v. Woods, 18 Fed. Rep., 665.
Schunk v. Moline Co., 147 U. S., 500.

So, also, jurisdiction is not lost by the complainant's change of residence subsequent to the filing of his bill or declaration.

Clark v. Matthewson, 2 Sumner, 262.
Connolly v. Taylor, 2 Peters, 556.
Morgan v. Morgan, 2 Wheaton, 297.
Ober v. Gallagher, 94 U. S., 199, 206.
Stewart v. Dunham, 115 U. S., 61, 64.
Phelps v. Oaks, 117 U. S., 236.

So where jurisdiction has been once given by the existence of diverse citizenship, it is not affected by a subsequent change of parties.

Hardenburgh v. Ray, 151 U. S., 112.
Wetherbee v. Stinson, 62 Fed. Rep., 173.

In *Mullin v. Torrence, 9 Wheaton, 535*, the Court said:

"It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events."

The appellees argue with much vigor that it is not within the power of the complainant to make the controversy. This is true, in so far as it is not within the power of any litigant to give a Court jurisdiction over an imaginary controversy, or over one which is manufactured for the fraudulent

purpose of creating jurisdiction where it would not otherwise exist. But it certainly is not true that a party is precluded from presenting an actual controversy, in reality existing and pending between him and another party. And it is likewise well established that where such controversy exists it is within the power of the complainant to present it for adjudication to any forum which has the constitutional or statutory right to take cognizance of it, and to shape his pleadings to that end.

Having thus exercised a legal right, he cannot be driven empty-handed, out of the court to which he has appealed for protection by a suggestion of the defendant that the latter does not desire to dispose of the entire controversy in an action brought for the determination of the whole and not of one aspect only of the existing conflict, which, although presenting several points of view, nevertheless consists of one entire and complete controversy.

In other words, the appellees' claim is, that because they choose to ignore an essential part of the controversy existing between the parties, that therefore a controversy other than that actually existing is presented for determination.

It is not understood that the appellees are willing to have an adjudication in this suit entered upon the records of the court that it has no rights in the ore in controversy, based upon the Rarus patent. If the appellant's right to such judgment were conceded, then something might be said in favor of the appellees' contention, although we by no means concede that jurisdiction is thereby ousted.

But, reserving to themselves the right to litigate all questions arising under the Rarus patent, in some other forum and at some other time, they

simply assert that because in their answer, after making various denials of the appellant's right to the ore in controversy, they plant themselves upon the Johnstown patent, the jurisdiction of the Court is to be determined, not by the cause of action stated in the bill of complaint, but by the issues which the defendant desires to substitute in place of those tendered by the appellant.

It is now conclusively settled that for purposes of jurisdiction of the Federal Court, both in the case where jurisdiction is originally invoked on the ground that the determination of the suit depends upon some question of a federal nature, as well as in cases where the case is removed from the State Court on that ground, the jurisdiction depends not upon the defenses interposed, but upon the case made by the declaration or bill of complaint.

State of Tenn. v. Union & Planters' Bank, 152 U. S., 454.

The appellees, however, insist that upon the interposition of their answer, there no longer was a subject matter of federal cognizance, because by such answer they terminated what might otherwise have been considered to be a controversy involving a construction of the statutes of the United States.

This is a mere play upon words. The subject matter in controversy between the parties was the ownership of certain ores in place, lying beneath the appellant's surface. The controversy was created by the claim of title made by the appellees, based upon the Rarus and Johnstown patents. The determination of that controversy involved a construction of an act of Congress. So long as the appellees do not concede that they have no right to this property, under the Rarus

patent, so long does the controversy described in the bill of complaint continue, and so long does federal jurisdiction attach, however much the appellees may desire the courts to lose sight of the actual point in dispute, by a cunning attempt to disguise the actual controversy.

Much stress is laid on the case of *Robinson v. Anderson*, *121 U. S., 522*, but that case has no application here. There an action was brought for the possession of lands under a Mexican grant. The plaintiff alleged that the several defendants claimed to be the owners of part of the estate overlapping that of the plaintiff, and that, if that were the case, the title of the defendants, being older, was asserted to have preference. Plaintiff further alleged that the defendants claimed that they were third persons, as to whom the patents granted to the plaintiff were not conclusive under an act of Congress. Many of the defendants answered, denying that they were in possession of any portion of the premises in dispute, others claiming that they were in possession with the consent of the plaintiff and not otherwise; others claimed to be in possession in severalty by virtue of written contracts for the conveyance of the several tracts of land by the plaintiff to the defendants. None of the defendants, in their answer, claimed title under the grant of the so-called overlapping estate. The complaint was in such form that it was very doubtful whether, standing by itself, it made out any case of jurisdiction.

The true ground of that decision is stated by Chief Justice WAITE as follows:

"The Circuit Court cannot be required to keep jurisdiction of a suit, simply because the averment in a complaint or declaration make a case arising under the constitution, laws, or treaties of the

United States, if when all the pleadings are in it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made for the purpose of creating a case cognizable by the Circuit Court when none in fact existed. The provision of Section 5 of the Act of 1875, requiring the Circuit Court to proceed no further, but dismiss the suit when it satisfactorily appears that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complainant was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff."

The fair construction of this language clearly indicates the ground of decision. It was not that the answer determined whether a case was of federal cognizance or not, but that all the pleadings in the case then under consideration indicated it to be an indisputable fact that the case made by the complainant was fictitious and not real; that it was a fraudulent attempt to confer jurisdiction where none existed; that there was not in reality any dispute between the parties which required a consideration of congressional legislation.

On the other hand, in the present case, the appellant's good faith is not only indicated by the entire history of this litigation, but by the very answer itself. The actual controversy between the parties does involve a construction of the mining laws. The case made out by the complainant is not fictitious. The appellees have not disclaimed an interest in the property in question under the Rarus patent. They in reality claim title adversely to that of the complainant, and their answer is such a mass of evasions that it is demonstrated that while they admit the existence of the very

controversy described in the bill of complaint, they are studiously attempting to transfer its determination to another forum.

III.

It is submitted that the decree of the Circuit Court of the United States for the District of Montana should be reversed, and the cause remanded to that Court with instructions to proceed therewith.

LOUIS MARSHALL,
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Appellants Counsel.